Supreme Court, U.S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 79-1015

WILLIAM LOMBARD, Sheriff of Monroe County,

Petitioner,

against

THOMAS E. TAYLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Daily Record
Rochester, New York

(5557)

Spaulding Law Printing
Syracuse, New York

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Second Circuit in the case of Thomas E. Taylor vs. William Lombard. The judgment was entered on October 1, 1979.

Opinions and Orders Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 606 F.2d 371 appended hereto in the Appendix at A-2. The opinion of the United States District Court for the Western District is not reported and is appended hereto in the Appendix at A-13.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1254 (1). The judgment of the Court of Appeals was entered on October 1, 1979 reversing the denial of respondent's petition for a writ of habeas corpus by the United States District Court for the Western District of New York.

Questions Presented

1 a: Did the Court of Appeals violate the strictures of 28 U.S.C. 2254(d) by ignoring the state court findings and substituting its own findings?

b: Did the Court of Appeals improperly relieve the *habeas corpus* petitioner of the burden of showing an error in the state court proceedings?

2 a: Could the Court of Appeals properly make findings of fact and conclusions of law since the state never had an opportunity to present contrary proof at any stage of the proceedings?

b: Could the Court of Appeals properly find there was perjury at trial even though the questioned testimony was never directly contradicted at either the trial or the post-verdict hearing?

STATEMENT

A. *Procedural history.*

Appellee Taylor was convicted of the misdemeanor of assault, third degree (New York Penal Law, §120.00) after a jury trial in the Town Court of Penfield, New York.

After verdict and before sentence, Taylor moved to set aside the verdict on the grounds the prosecutor knowingly used perjured testimony during trial.

The motion was served one day before it was to be argued, and the trial prosecutor orally made a general denial. A hearing was thereafter held pursuant to New York Criminal Procedure Law §330.40-2 (f). After the hearing, the court found there was no perjury, and denied the motion to set aside the verdict.

On appeal (after sentence), the Monroe County Court (Donald J. Mark, J.) affirmed in a written opinion. Further, permissive, appeal was denied.

The present respondent then commenced this habeas corpus proceeding in the Western District of New York. Judge Burke of that court denied the petition without a hearing in reliance on his review of the hearing transcripts.

The Court of Appeals reversed unanimously, and in a devastating finding, said (606 F.2d at 372):

> On our review of the record we conclude that the prosecutor knowingly acquiesced in perjured testimony, and that the revelation of the perjury at trial could well have resulted in a different verdict.

B. *Factual Background*

There is little dispute as to the facts of the case. Taylor admitted at the trial that he struck the victim, John Gavender during an altercation in a restaurant. He said however that he

acted in self-defense, after Gavender struck him. Mrs. Gavender and their friends Carl and Ann Luther were eye-witnesses and each testified.

It was the theory of the defense that Taylor interceded in an argument between the victim Gavender and a man named Swystun as a peacemaker and that Gavender hit Taylor first.

The defense also sought to convince the jury that Gavender, prior to the fight, had touched or fondled Swystun's companion named Debbie Murray (also called "Kathy"), and that Mrs. Gavender made improper suggestions to Ms. Murray about a sex party and having sex with another woman. That series of events, the defense suggested, led to the confrontation between Gavender and Swystun, which in turn led to Taylor's intervention.

To support or bolster this theory, defense counsel asked Mr. and Mrs. Gavender and Mr. and Mrs. Luther questions designed to show that they gave sex parties and were generally promiscuous.

Each specific question in this area asked by defense counsel of these witnesses on cross-examination was denied by them.

The prosecution's theory was that the Luthers and Gavenders were there to buy a stereo set from the restaurant manager and that the attack by Taylor was unprovoked.

After the jury rendered its verdict, and before sentence, Taylor moved to set aside the verdict pursuant to New York Criminal Procedure Law §330.30, on the grounds that the prosecutor had knowingly used perjured testimony.

The court ordered a hearing, during which the defense called only two witnesses: Christine Cudzillo, who had not testified at the trial, and Mrs. Carl (Ann) Luther, who had testified at trial.

Their testimony was generally consistent and established that, just before trial, the trial prosecutor asked Mrs. Luther (who was

then under subpoena as a prosecution witness) if there was anything he should know. Mrs. Luther told him she and her husband were "swingers." Definition of "swinger" was never explored, either at trial or during the post-verdict hearing.

No other testimony of significance was elicited at the hearing, and there was absolutely no testimony concerning perjury.

In response to the habeas corpus petition, the state moved to dismiss. After reviewing the transcripts of the hearing, the district judge denied the prosecution's motion for dismissal, and then found (*inter alia*) "The prosecutor did not knowingly use perjured testimony at the trial." (A-14).

Based on the same record, the circuit court concluded there was perjury and that the prosecutor knowingly acquiesced to its use by not informing defense counsel of Mrs. Luther's statement that she and her husband were "swingers."

This, of course, directly contradicts the state court findings. The circuit court specifically pointed to one question and answer as being perjurious. At 606 F.2d 375, the court said:

> Our review of the evidence presented in support of Taylor's motion leads us to conclude that Carl Luther gave perjured testimony at trial when he denied that he or his wife had ever had sexual relations with another in the presence of each other. The County Court's finding that there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference. 28 U.S.C. §2254(d)(8).

The court was apparently referring to the testimony at trial found at page 103 of the transcript, where Mr. Luther is being cross-examined by defense counsel:

> "Q. Okay, Mr. Gavender, or Mr. Luther, have you and Mr. Gavender or your wives had sexual relations with anyone in the presence of each other?
>
> A. No."

The difficulty with this conclusion is that there is absolutely no testimony concerning the sex habits of the Luthers prior to the trial anywhere in the post-verdict hearing. It happens that an affidavit by Ms. Cudzillo directly contradicting Mr. Luther's above quoted answer was attached to the moving papers in the state court. However, she was never asked that question during her testimony. While the affidavit supported the request for a hearing, it could not be used by the hearing judge as substantive evidence, and we urge, should not have been relied on by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The procedure followed below conflicts with 28 U.S.C. §2254(d) and with the decisions of other Courts of Appeals.

The district court denied the application for a writ of habeas corpus without holding an evidentiary hearing because, based on its review of the state court post-verdict hearing, it found that: "The prosecutor did not knowingly use perjured testimony at trial." (A-14).

The Court of Appeals reversed, finding that there was perjury, on a material point, and that the trial prosecutor knowingly acquiesced in its use. *Taylor v. Lombard*, 606 F.2d 371, 372 (A-4).

We urge that this conclusion by the circuit court was made in violation of 28 U.S.C. 2254 (d), because the state court findings were ignored. The court below dealt with this issue by saying:

> "The County Court's finding that there was no factual basis for the claim of perjury is not fairly supported by the record and therefore is not entitled to deference. 28 U.S.C. 2254 (d) (8)." (606 F. 2d at 375).

This particular statement presents us with two problems: first it begs the question, and second, the County Court was sitting as

an intermediate appellate court, and made no independent findings; it merely affirmed and explained the findings implicit in the decision of the state trial court.

The district court as it must, presumed the regularity of the state proceedings pursuant to 28 U.S.C. 2254 (d), and the petitioner had the burden of showing any defects in the state proceedings. *LaVallee v. Delle Rose*, 410 U.S. 690, 695; 93 S.Ct. at 1206 (1973). The second circuit previously also so held in *Tanner v. Vincent*, 541 F.2d 932, discussion at 937 (2d cir., 1976). Petitioner never met this burden.

There was no suggestion, anywhere, that the accused was not given a full and fair opportunity to be heard in the post-verdict hearing. At the conclusion of that hearing, the trial court denied defendant's motion because he had not carried his burden of proof. It is surprising therefore, to have the Court of Appeals say the record does not support the state court findings, because, we urge, the opposite is true: the findings of the Court of Appeals are not fairly supported by the only record available — the state court record.

At trial, there was no direct contradiction of any of the testimony of the prosecution's witnesses relating to their sex habits. At the post-verdict hearing, there was also no testimony about Mr. Luther's sex habits, and only innuendo about Mrs. Luther's habits. The trial court came to the only logical conclusion, because there was simply no testimony concerning perjury at the post-verdict hearing and there was no attempt to contradict the testimony offered at trial. Therefore, for the Court of Appeals to ignore the findings of the state court, and, on the same record, come to an opposite finding is in direct conflict with 28 U.S.C. 2254(d). Furthermore, the petitioner below could point to no defect in the state court proceedings as required by 28 U.S.C. 2254(d)(8). If allowed to stand, the decision below will be in sharp conflict with several of the other circuits. See, e.g., *Vellaca v. Supt., M.C.I., Walpole*, 523 F.2d 1040 (1st cir., 1975); *Howard v.*

Maggio, 540 F.2d 1280 (5th cir., 1976); *U.S. ex rel. Walker v. Twomey*, 484 F.2d 874 (7th cir., 1973); *Winford v. Swenson*, 517 F.2d 1114 (8th cir., 1975). This decision, furthermore, will increase the friction between the state and federal systems, particularly since the Court of Appeals seems to have both ignored the findings in the state court and selectively read the trial record to support the conclusion it finally made. We do not suggest that a federal court could never come to that conclusion, but, we do urge that the court below reached an extreme result on sketchy evidence.

The court below, in effect, took one question (addressed to Mr. Luther):

> Q. . . . (H)ave you and Mr. Gavender or your wives had sexual relations with anyone in the presence of each other?
>
> A. No.
>
> (trial transcript at pg. 103; 606 F.2d at 373-74; A-7)

and determined first that the answer was a lie, and second that the trial prosecutor knew it was a lie.

The court below equated the term "swingers" with the substance of the quoted question, and then reasoned that Mr. Luther was lying because of Mrs. Luther's earlier statement that they were "swingers."

Since Luther's answer was a negative pregnant, there is no way to know what he was denying. How then could the circuit court determine he wasn't telling the truth? Even if he spent all his time in sexually promiscuous behavior, the "no" answer could be correct.

The question appears to ask whether Mr. Luther and Mr. Gavender engaged in group sex in each other's presence, which might not be the case. Or, it might mean that the wives and one of the husbands engaged in group sex, which also might not be the case. The permutations are endless.

Since the question is ambiguous and the answer therefore not very meaningful, how could the prosecutor assume the answer was less than truthful?

The court below answered this question by pointing to the prosecutor's summation, where he used that term. The court said, 606 F.2d at 374 (A-9):

> the prosecutor's own summation interpreted the denials made as denials of "swinging."

That is not, however, exactly what the prosecutor did. The defense, during the trial, suggested by its questions that the Gavenders and Luthers were there that night for some sex-related activity.* That argument had been refuted by the trial testimony, and in his summation, the prosecutor responded by saying:

> ". . . it's obvious that the Gavenders and Luthers were not at the Overlook that night for sexual reasons, they were there for a legitimate reason of buying stereo equipment that night as both they, the police officers and the receipt proves. There have been inferences that the Gavenders and Luthers were swingers, that's totally been denied by them. And what have you seen to the contrary? . . ."
>
> (transcript of December 21, 1976, at pg. 156)

Clearly, he was talking about their activities that night, and made fair comment on the testimony.

Presumably the trial court, which saw and heard the witnesses and the summation, and also reviewed the transcript of the cross-examination at trial of Mr. and Mrs. Luther just before making its decision (transcript of post-verdict hearing on March 2, 1977 at pgs. 143-145), was in a better position to decide the

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*That suggestion also appears in a letter from defense counsel to the prosecution before indictment. Although not a part of the state court record, it was presented to the district court and apparently considered by the Court of Appeals. See discussion 606 F.2d at 372, fn. 2 [A-5].

factual issues than the Court of Appeals, and the decision in the state court was entitled to more deference than the Court of Appeals gave it.

It is now well settled that the federal courts are not bound by state determinations of federal questions. *Brown v. Allen* 344 U.S. 443 (1953). So, for example, if in this case, the trial court had found that there was perjury, but that it wasn't sufficiently material to deny due process, the federal court would determine the due process issue irrespective of the state court determination of that question. Here, however, the state court found there was no perjury, something they were perfectly competent to do, and something the federal courts could not ignore unless they found a deviation of the requirements in 28 U.S.C. 2254(d).

While the court below said the state determination was not supported by the record, we urge they could make no such determination, because all the state court found was that the defendant had not proved any perjury. Since there was no proof offered at the post-conviction hearing to establish a perjury, there is no way, consistent with the meaning of 28 U.S.C. 2254(d) that the Court of Appeals could make the finding it made.

This court dealt with the issue of federal court fact hearings arising from *habeas corpus* claims of state confined prisoners in *Townsend v. Sain*, 372 U.S. 293 (1963). Thereafter, 28 U.S.C. 2254 was amended by adding subparagraph (d), which apparently accepted the thrust of the holding in *Townsend*, but established procedural limitations on *de novo* hearings in federal court.

In our view, the holding below seriously weakens the efficiency of that subparagraph because it allows a federal court to disregard state fact findings almost at will. Since *habeas corpus* petitions are among the most commonly filed applications in the federal courts, we urge the court to grant review and establish the appropriate standard for review of state fact findings in federal *habeas corpus* applications.

2. Assuming the state court findings were properly rejected, the state should nevertheless have been afforded an opportunity to present testimony before the Court of Appeals made final findings.

At the conclusion of the defendant's proof at the post-verdict hearing, the prosecution moved for dismissal. There was some technical question about the authenticity of portions of the trial transcript provided by the prosecution. The court reserved decision on the motion and after the court stenographer was sworn and authenticated those transcripts (exhibits 2 and 3 at the hearing), the court made its ruling.

Thereafter, the district court denied the habeas petition without a hearing. The prosecution therefore was never given any opportunity to present proof. Even if the Court of Appeals was correct in its evaluation of the state court findings, it should not have made any final determination without ordering a further hearing, either in the state or federal court. 28 U.S.C. §2243.

Conclusion

For the foregoing reasons, we respectfully ask that a writ of certiorari issue to review the judgment and decision of the second circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Order of United States Court of Appeals
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of October one thousand nine hundred and seventy-nine.

Present: HON. IRVING R. KAUFMAN, Chief Judge; HON. JON O. NEWMAN; HON. AMALYA L. KEARSE; Circuit Judges,

---

THOMAS E. TAYLOR,

Petitioner-Appellant,

v.

WILLIAM LOMBARD, Monroe County Sheriff,

Respondent-Appellee.

79-2072

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is

remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

/s/ ARTHUR HELLER
BY: Arthur Heller,
Deputy Clerk

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
[606 F.2d 371 (1979)]

Thomas E. TAYLOR,
Petitioner-Appellant,

v.

William LOMBARD
Respondent-Appellee.

No. 62, Docket 79-2072.

United States Court of Appeals,
Second Circuit.

Argued Sept. 5, 1979.

Decided Oct. 1, 1979.

Person who had been convicted in the state court of assault sought habeas corpus. The United States District Court for the Western District of New York, Harold P. Burke, J., denied the petition and accused appealed. The Court of Appeals, Kearse,

Circuit Judge, held that prosecutor's knowing use of perjured testimony by one of the witnesses to the alleged assault deprived the accused of due process.

Reversed and remanded.

[372]

Leslie A. Bradshaw, Rochester, N.Y., for petitioner-appellant.

Sharon P. Stiller, Rochester, N.Y. (Lawrence T. Kurlander, Dist. Atty. for Monroe County, on the brief), for respondent-appellee.

Before KAUFMAN, Chief Judge, and NEWMAN and KEARSE, Circuit Judges.

KEARSE, Circuit Judge:

Thomas E. Taylor appeals from a judgment of the United States District Court for the Western District of New York, Harold P. Burke, J., denying his petition for a writ of habeas corpus. In 1976 appellant was found guilty of assault in the third degree, N.Y. Penal Law §120.00(1) (McKinney 1975), by a jury in the Justice Court of the Town of Penfield. After trial appellant moved to set aside the verdict, principally on the ground that several prosecution witnesses had perjured themselves and that the prosecutor had knowingly acquiesced in their perjury. The motion was denied from the bench after a hearing, and appellant was sentenced to ten months in the Monroe County Jail. The judgment of conviction was affirmed in a written decision by the County Court, Monroe County, and the New York State Court of Appeals denied leave to appeal.

Appellant then filed his petition in the district court, raising the same claims he had presented in the state court proceedings.

On a review of the state court record, and without holding a hearing, Judge Burke concluded that appellant's claims had no factual basis and denied the petition. Taylor appeals from this denial.[1]

[1] Since the district court findings were based solely on a review of the state court record, we are not bound by the "clearly erroneous" standard of review under Rule 52(a), Fed.R.Civ.P., but may make our own independent factual determination. *Smith v. Regan*, 583 F.2d 72, 76 (2d Cir. 1978); *United States ex rel. Lasky v. LaVallee*, 472 F.2d 960, 963 (2d Cir. 1973). On our review of the record we conclude that the prosecutor knowingly acquiesced in perjured testimony, and that revelation of the perjury at trial could well have resulted in a different verdict. Accordingly, we reverse.

I

The assault charge was lodged against Taylor as a result of an altercation at a bar in Penfield, New York. The factual issues on appeal are whether there was perjured testimony at the trial and, if there was, whether the prosecutor knowingly acquiesced in its use.

At trial, both sides agreed that there was a fight between Taylor and John Gavender at the Overlook Bar on the evening of Sep-

[373]

tember 9, 1976, but they disagreed as to its cause and the circumstances leading up to it. Taylor sought to prove that he had

[1]Two months after the district court denied his petition, Taylor was released from jail. Of course, this does not prevent our consideration of his claim. *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

acted in self-defense and in the defense of others. His theory, set out in a letter sent to the district attorney's office before trial,[2] was that Gavender and his wife and Anne and Carl Luther had come to the bar to find people to invite to a "swinging" group sex party, and that the fight arose as a result of their obnoxious advances toward other patrons in the bar. The Gavenders and the Luthers contended that Taylor had started the fight suddenly and with no provocation.

The defense witnesses, including Taylor, Debbie Murray and Joseph Swystun, testified to the following particulars: The Gavenders and the Luthers, and Taylor, Murray and Swystun were all in the barroom. In the course of conversation Gavender and his wife made several sexually suggestive remarks to Taylor, concerning Mrs. Gavender. At some point Anne Luther asked Murray whether she wanted to have a sex party with the Luthers, whether she had ever had sex with a woman, and whether she would like to. The two wives were loudly using foul language, and when they persisted, Taylor ordered Mrs. Gavender a glass of dishwater. Mr. Gavender told Taylor not to do it again, but no blows were exchanged. Gavender subsequently grabbed Murray's buttocks while walking past her at the bar, and Swystun told him to keep his party in his corner and to keep his hands off Murray. Gavender swore at Swystun and "came at" him. Taylor got between the two, seeking to prevent a fight, and told them to take it easy. Gavender shoved Taylor out of his way, and Taylor then grabbed Gavender, pushed him against the wall and held him there, letting him go when Gavender said that he was all right. As Taylor turned away,

[2]The letter stated, in relevant part, that the Gavenders and Luthers were at the bar "for the obvious purpose of picking up some people to 'swing' with. While Kathy [an assumed name] Murray was waiting for Swystun to arrive, Noryene Gavender told Kathy that she'd be great at their party and that she'd like to have sexual relations with her."

Gavender punched him on the side of the head. Taylor turned and hit Gavender with the back of his hand, knocking him against the wall. Taylor then picked Gavender up, offered to shake his hand, and upon being refused, left the bar. Taylor testified that throughout the incident he sought to avoid trouble and to play the role of the "peacemaker." He attributed the seriousness of Gavender's injuries to exposed nails in the wall against which he had pushed Gavender, which none of the participants had noticed in the dim light of the bar.

The Gavenders and Luthers, testifying for the prosecution, presented a quite different version of the incident. According to them, Taylor started the fight without provocation and for no apparent reason. It was Taylor who had made the suggestive remarks to Gavender and his wife concerning Mrs. Gavender, but nothing came of them. Later Mr. Gavender stepped away from the bar, and Taylor was conversing with the two wives. Taylor suddenly became very abusive, calling Mrs. Gavender various names. Although Mrs. Gavender had used no vulgar language, Taylor accused her of having a dirty mouth and ordered a glass of dishwater for her. Mr. Gavender returned to the bar and Taylor told him that Mrs. Gavender had a dirty mouth. Gavender replied that he did not want to fight but wished that Taylor would not talk that way about his wife. Taylor then proceeded to beat up Gavender, punching him numerous times and banging Gavender's head on an air conditioner. The prosecution witnesses denied any offensive or obnoxious statements or conduct on their part.

On cross-examination, defense counsel asked the Luthers and John Gavender several questions concerning their sexual practices and experience. Most important for purposes of this appeal are two questions put to Carl Luther, and his answer to one of them:

> Q. Have you ever asked to be able to use the back room of the Overlook Motel for swinging parties? [Objection as to relevancy sustained.]
>
> Q. [H]ave you and Mr. Gavender or your wives had sexual relations with anyone in the presence of each other?
>
> [374]
>
> A. No.[3]

Luther also denied that he or his wife had invited Murray to their house for a party later that evening.

---

[3]On cross-examination of John Gavender, the following testimony was given:

> Q. Have you ever had sexual relations with anyone at all in the presence of the Luthers?
>
> A. Never.
>
> . . .
>
> Q. Have you asked Mr. Bookless to fix you up with prostitutes or other women while you have been out on the road or at any other time in the – A. Never.
>
> . . .
>
> Q. Mr. Gavender, are you a swinger? A. No.
>
> Q. Do you know what the term swinger means? A. Yes.
>
> . . .
>
> Q. Does your wife have your permission to have sexual relations with other persons besides yourself? A. Definitely not.

Mrs. Luther was aked:

> Q. Did you have parties with the Falzones in which sexual relations were conducted?

to which she replied "no."

The jury was thus presented with two completely different versions of the incident. As the prosecutor noted on summation, the whole case turned on credibility. The defense version was plausible only if the jury believed that the Luthers and Gavenders were at the bar looking for people with whom to "swing," but the prosecution witnesses denied having any such intentions or proclivities.

The prosecutor stated on summation,

> ... the whole defense is absurd. You heard an inference that the victims were swingers, that the Luthers and Gavenders were swingers and were at that bar to engage in sexual activities, they were there to pick up people ...
>
> ... There have been inferences that the Gavenders and Luthers were swingers, that's totally been denied by them. And what have you seen to the contrary?

The jury apparently believed the prosecution witnesses, for they found Taylor guilty.

In fact, as it later transpired, Anne Luther had informed the prosecutor a week before trial that she and her husband were "swingers." She had made this disclosure in the presence of her husband, in response to the prosecutor's request for any information he should have in order not to be surprised at trial by evidence the defense might produce.

Anne Luther's statement first came to light after trial, when defense counsel, in support of a motion to set aside the verdict, produced an affidavit from one Christine Cudzilo, designed to show that perjury had occurred and that the prosecutor knew it. Cudzilo's affidavit described numerous sex parties she had attended at the Luthers' house prior to the events involved in the Taylor trial, at which the Luthers had engaged in sexual acts with other persons in the presence of each other. Cudzilo also

stated that Anne Luther had told Cudzilo about her statement to the prosecutor. Cudzilo testified at the post-trial hearing on the motion and was cross-examined at some length.

At the hearing the prosecutor initially denied that Anne Luther had told him that she and her husband were "swingers." He abandoned that position, however, when Anne Luther herself took the witness stand and testified that she had so informed the prosecutor.

The trial court denied the defense motion from the bench without an opinion. Affirming, the County Court opined that the prosecutor's knowledge that the Luthers were "swingers" would have been insufficient to lead him to believe either of them was lying in response to questions that did not use that precise term. The court found this premise "obvious" notwithstanding the fact that the prosecutor's own summation interpreted the denials made as denials of "swinging." Thus, that court concluded that there was no showing of either perjured testimony or, the knowing use of it.

II

[2] It is well established that a prosecutor's knowing use of perjured testimony violates the due process clause of the Fourteenth Amendment. *Giglio v. United*

[375]

States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 269, 271-72, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 267 (2d Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). Due process requires

not only that the prosecutor avoid soliciting false testimony but that he not sit idly by and allow it to go uncorrected when it is given. *Giglio, supra,* 405 U.S. at 153, 92 S.Ct. 763; *Napue, supra,* 360 U.S. at 269, 79 S.Ct. 1173. The requirement applies even when the perjury relates to a witness' credibility rather than bearing directly on the defendant's guilt:

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . .

Napue, supra, 360 U.S. at 269-70, 79 S.Ct. at 1177. And when truthful testimony not only would have cast doubt on the witness' credibility but also would have tended to corroborate the defendant's version of the facts, the perjury is all the more pernicious. *Alcorta v. Texas,* 355 U.S. 28, 31-32, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

[3] Where we are confronted with a claimed error of constitutional magnitude we must review the record to make our own determination as to whether or not the error occurred, and, if it did, whether there was any reasonable likelihood that it affected the fairness of the defendant's trial. *See Napue, supra,* 360 U.S. at 271, 79 S.Ct. 1173; *U.S. ex rel. Washington v. Vincent, supra,* 525 F.2d at 267.

[4] Our review of the evidence presented in support of Taylor's motion leads us to conclude that Carl Luther gave perjured testimony at trial when he denied that he or his wife had ever had sexual relations with another in the presence of each other. The County Court's finding that there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference. 28 U.S.C. §2254(d)(8). We similarly reject the prosecutor's contention that he could not be expected to recognize that denial by Luther as a denial of

"swinging." His claimed lack of comprehension is belied by his own summation: he used the term "swingers" three times in ridiculing the defense theory. And as to those "inferences that the Gavenders and Luthers were swingers," he said, "that's been totally denied by them." The prosecutor knew the denial was false. Yet he not only failed to correct it, he emphasized and relied on it.

The perjured testimony may easily have affected the fairness of Taylor's trial in several ways. The disclosure of Anne Luther's earlier admission that she and her husband were swingers could well have influenced the jury's assessment of her credibility and her husband's credibility. It could also have led to a foundation for a similar attack on the credibility of the Gavenders. And apart from questions of credibility, truthful testimony would have tended to corroborate Taylor's contention that the Luthers and Gavenders had gone to the bar seeking "swinging" companions, thereby giving credence to Taylor's version of the events leading to the fight.

The judgment denying the petition is reversed and the case is remanded for consideration of appropriate relief.

JUDGMENT OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF NEW YORK

Civil Action File No. 78-573

THOMAS E. TAYLOR,

vs.

WILLIAM LOMBARD, Sheriff, Monroe County

This action came on for hearing before the Court, Honorable Harold P. Burke, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that petitioner's application for a writ of habeas corpus is in all respects denied.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

Dated at Buffalo, New York, this 15th day of December, 1978.

JOHN K. ADAMS
Clerk of Court

OPINION OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS E. TAYLOR,

Petitioner,

vs.

WILLIAM LOMBARD, Sheriff, Monroe County,

Respondent.

CIVIL 78-573

Leslie Bradshaw
1278 Genesee Park Blvd.
Rochester, N.Y. 14619
Attorney for petitioner

Melvin Bressler
Assistant District Attorney
of Monroe County
Hall of Justice
Rochester, N.Y. 14614
Attorney for respondent

The petitioner is held on a judgment of conviction and sentence entered March 21, 1977 in the Penfield Town Court, Penfield, New York. He was sentenced to a term of ten months on March 21, 1977 for assault in the third degree. The judgment was affirmed by the Monroe County Court on July 18, 1978. The Court of Appeals of New York denied leave to appeal on September 7, 1973.

The claims of the petitioner in this proceeding are: (1) Prosecutor's knowing use of perjured testimony violated due process. (2) Perjured prosecution testimony violated right of

confrontation. (3) Refusal to permit defense to call prosecutor as a witness to see dummy document used by prosecution on cross examination violated due process and right to call and examine witnesses. (4) Prosecutorial misconduct denied fair trial.

By order of this court dated September 29, 1978 the respondent was directed to produce for this court's examination the record of the proceedings at the trial. The presence of the petitioner was not required on the return of the order. The respondent has produced for this court's examination the record of the proceedings at the trial.

By motion with supporting papers filed October 23, 1978 the respondent moves to dismiss the petition on the grounds that the petition fails to state a claim upon which relief can be granted. In the alternative, he moves for summary judgment for the respondent on the ground that there is no genuine issue as to any material fact and that respondent is entitled to judgment as a matter of law. The motion of the respondent is in all respects denied.

The petitioner has filed an expanded record dated November 7, 1978.

On the evidence before me I find: The prosecutor did not knowingly use perjured testimony at the trial. There is no basis for petitioner's claim that perjured prosecution testimony violated right of confrontation. The refusal to permit defense to call prosecutor as a witness to see dummy document used by prosecution on cross examination did not violate due process and the right to call and examine witnesses. There is no basis for petitioner's claim that prosecutorial misconduct denied him a fair trial. There is no showing that any constitutional rights of the petitioner were violated.

IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is in all respects denied.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

December 14, 1978.

DECISION OF MONROE COUNTY COUNTY COURT

STATE OF NEW YORK
COUNTY COURT – COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

vs.

THOMAS E. TAYLOR,
Defendant-Appellant.

APPEARANCES:

For the Plaintiff:

LAWRENCE T. KURLANDER, Monroe County
District Attorney, by *Assistant*
District Attorney LOUIS PILATO,
of Counsel

For the Defendant:

LESLIE A. BRADSHAW, Esq.,
Attorney at Law

DECISION

MARK, J. This is an appeal from the judgment of the Town Court, Town of Penfield, rendered March 21, 1978, convicting the defendant, after trial by jury of the crime of Assault in the 3rd Degree. Defendant was sentenced thereon to a definite term of imprisonment of ten months in the Monroe County Jail. Execution of the sentence was stayed pending the outcome of the instant appeal.

It appears that on September 9, 1976, an altercation arose at the Overlook Motel, Penfield, New York. A total of seven witnesses testified as to the occurrence, itself.

John and Noryene Gavender, together with Carl and Anne Luther all testified for the prosecution. According to them, they were at the Overlook bar for the purpose of bringing home some stereo equipment that was being purchased by the Luthers from the owner of that establishment. While Carl was seeing to the equipment, the ladies ordered a drink and sat by the bar. John engaged the defendant, who had just been introduced to him, in several games of pinball bowling. After a time, defendant approached the bar while John continued to "bowl." At the bar, after a discussion of ethnic origins, defendant became increasingly abusive toward Noryene, and he eventually ordered a glass of dishwater for her to drink, avowedly for the purpose of cleaning of her mouth.

At that time, John returned to the bar. When he was made aware of what happened, John indicated to defendant his disapproval of defendant's actions. Defendant then punched him several times. Defendant paused for a time, but at the mention by John of the police, defendant again began punching John. At one point, defendant picked him up by the shoulders and banged his head against an air conditioner. Ultimately, the beating ceased, and the police were called. John was taken to the hospital. By the time that the police arrived, defendant had left the scene.

Defendant Taylor, Joseph Swystun, and Deborah Murray testified for the defense. According to them, the Luthers and Gavenders had been drinking at the bar for some time and were generally using loud and abusive language. Defendant was employed by a heating contractor and had gone to the Overlook bar to estimate the cost of some construction work there. After eating and drinking, defendant met the Luthers and Gavenders,

and played John some games on the pinball bowling machine. Subsequently, defendant went back to the bar and spoke with Anne and Noryene. The ladies began using foul language and so defendant offered Noryene a glass of dishwater for her mouth.

When John returned to the bar, words were exchanged between him and the defendant, but no blows were struck. John then returned to the bowling game. Later, John got into an argument with Joe Swystun over certain indecent advances made by John to Debbie Murray. Defendant, who was over six feet tall and weighed 240 lbs., went over to get between them. He "had to push" his way in. John then told defendant to mind his own business and he "tried to push" defendant. At that point defendant grabbed John and "gave him a pushing shove" and "slammed him" against the wall. He held John, who was "trying to get away," there for a time. Defendant then released him, turned, and felt a punch land on his ear. Defendant then turned and punched John in the head. Defendant held onto John, who was still "trying to get away," and defendant partially tripped or fell against the wall. Defendant left the premises because he was afraid that his parole would be revoked.

John's injuries included multiple lacerations and contusions. One cut was over the left eye; one in the back of the head that required numerous stitches; and one in the mouth. Defendant claimed that most of these injuries were suffered when John came into contact with exposed nails on the wall of the bar.

At trial on a charge of Assault in the 3rd Degree, the defendant raised the defense of justification, and an appropriate charge thereon was delivered to the jury. The jury found defendant guilty as charged.

A post-trial motion was made to set aside the verdict pursuant to Criminal Procedure Law, Section 330.30. In connection therewith, a hearing was held to determine whether there was a

knowing use of perjured testimony on the part of the Assistant District Attorney. After the hearing, the trial court ruled that defendant failed in his burden of proof as required under CPL Section 330.40(g), and denied defendant's motion.

Thereafter, defendant was sentenced to the maximum determinate sentence of one year. This was mitigated by two months of time served on a violation of defendant's parole, resulting in a sentence of 10 months.

The first point of defendant on appeal is that the trial court failed to follow the requirements of CPL Section 330.40 when it did not make findings of fact in its decision denying defendant's motion to set aside the verdict. Said section provides in subparagraphs (f) and (g) as follows:

> "(f) If the court does not determine the motion pursuant to paragraphs (d) or (e) (i.e. does not summarily grant or deny the motion), it must conduct a hearing and make findings of fact essential to the determination thereof;
>
> (g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion."

In the instant case, the trial court was initially presented with affidavits that generally stated in a hearsay manner that one of the prosecution witnesses, Anne Luther, had told an Assistant District Attorney prior to trial that she and her husband were "swingers." The court, at that point did not have available a trial transcript detailing testimony, but was aware that certain questions relating to sexual conduct had been asked of these witnesses in the negative. The Court ordered a hearing solely on the basis of the holding in *United States ex rel. Washington v. Vincent*, 525 F2d 262 (2d Cir. 1975).

At the hearing, defendant was allowed to pursue these allegations of fact. One witness testified that she had recently

engaged in sex with the Luthers. Anne Luther, herself, testified. However, her testimony indicates only that during the course of other pre-trial discussions she told the Assistant District Attorney who was to try the case that she and her husband "were swingers," with no further explanation whatsoever of what she meant by the use of that general term. Finally, the official transcript of the cross-examination of prosecution witnesses was made available to the court. The court then made its ruling, and noted that no findings of fact were required.

From the foregoing it appears obvious that the trial court, perhaps in an excess of caution, ordered the hearing for the purpose of allowing defendant to explore this area. It is equally obvious from the record that Mrs. Luther's obscure reference to herself and her husband as "swingers" would not have been enough to cause any reasonable prosecutor to believe that either she or her husband were lying about the few specific questions asked by them on cross-examination, none of which questions even utilized that term. Once the court determined this, it became clear that no findings of fact were essential to its determination. Even assuming all testimony at the hearing to be true, there was no showing of either perjured testimony or the knowing use of it. Such was implicit in the court's ruling *People v. Alfinito*, 16 NY2d 181.

Defendant's correlative point alleging a denial of the right to confront witnesses is based upon these same allegations and is equally without merit.

Defendant next proposes that reversible error was committed when the court, over objection, allowed the District Attorney to ask Deborah Murray the following questions: "Is it not also true that Mr. Taylor sells your services to other people and you are Mr. Taylor's girlfriend on the side?" The witness had just denied being a prostitute. Counsel's specific objection was "I object to this, Your Honor, the questions are phrased and line of

statements as if the District Attorney has some knowledge of some sort of activity. I challenge the good faith of such questions."

Previous testimony had indicated that this witness had been in the company of defendant at the bar and had been introduced as his girlfriend; that she had been using an alias; and, that she was at the bar to meet Mr. Swystun for an assigned date. It was subsequently shown that she had been arrested recently for Prostitution, and had pleaded guilty to a lesser charge in satisfaction of that arrest. Under the circumstances, it appears that the prosecutor had a good faith basis for such a question, inasmuch as his question arguably had "some basis in fact." See, *People v. Schwartzman*, 24 NY2d 241. Such was the court's ruling at that time. Counsel's specific objection alleging a lack of good faith did not serve to direct the court's attention to any factor of undue prejudice to defendant by implication, which position is only now set forth on appeal *People v. Vidal*, 26 NY2d 249. Unless the question objected to is inherently inappropriate, this objection is deemed to have been waived. Here, the question was appropriate to show any possible bias of the witness *People v. Webster*, 139 NY 73.

Good faith having already been shown on the record, the trial court properly denied defense counsel's request to call the District Attorney as a witness as to his basis for this question.

Defendant asserts that the questioning of defendant with regard to a prior assault was in violation of a pretrial ruling by the court made pursuant to *People v. Sandoval*, 34 NY2d 371. The contents of said ruling do not appear on the instant record. As such, this point is not properly presented and cannot be properly considered by this court *People v. Mann*, 42 AD2d 587, *People v. Williams*, 20 AD2d 963. Further, it appears that defendant's objection to this question was untimely, made only after an answer had been given, and yet another question asked.

The t[illegible]l court, nevertheless, sustained the objection. However, no further motion to strike, or for instructions to disregard was made. In the absence of any such request of the trial court's aid, appeal on this ground does not lie *People v. Lee*, 35 AD2d 853.

It is further claimed that the refusal of the trial court to charge the jury on Disorderly Conduct as a lesser included offense pursuant to CPL Sections 300.50(1) and (2) constituted reversible error.

When it is impossible to commit a particular crime without concommitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is with respect to the former a lesser included offense *CPL Section 1.20(37), People v. Henderson*, 41 NY2d 233. Simply stated, this means that the elements of a greater offense must include all of the elements of the lesser offense before the lesser offense can be called a "lesser included offense." By analysis, the elements of the charge of Assault in the 3rd Degree in the instant case were as follows:

1. the defendant
2. caused impairment of physical condition or substantial pain
3. to John Gavender
4. when it was his conscious objective to cause such a condition or pain.

See Penal Law Sections 120.00(1), 10.00(9), and 15.05(1).

It is evident from this that the crime of assault is designed to prevent a personal injury to an individual. See, e.g., *People v. Moyer*, 27 NY2d 252.

By contrast, the elements of Disorderly Conduct are as follows:

1. the defendant
2. engaged in fighting or in violent or threatening behavior

3. when it was his conscious objective to cause public inconvenience, annoyance, or alarm; or, when he recklessly created a risk that his actions would cause public inconvenience, annoyance or alarm.

See Penal Law Sections 240.20(1), 15.05(1) and (3). The clear intent of this statute to penalize a breach of the public peace, as opposed to a private annoyance. See, *People v. Smith*, 19 NY2d 212; Penal Law Section 240.20, Practice Commentary (McKinney 1967).

It is clear that if the prosecutor had proved all of the above listed elements for Assault in the 3rd Degree, he would have yet to prove that defendant intended to cause some public breach of peace. Accordingly, Disorderly Conduct cannot be considered a "lesser included offense" of Assault, and the trial court's refusal to so charge on that basis was proper.

Defendant's assertion to the contrary notwithstanding, it appears that the evidence was fully sufficient to support a conviction in the instant case. Each of the above listed elements for Assault in the 3rd Degree was satisfied. Further, although defendant attempted to raise a defense of justification it does not appear that the facts as presented establish any reasonable ground for defendant to have believed that John Gavender was about to use physical force either upon him or Swystun. Defendant himself testified that he first shoved Gavender, then Gavender "tried to shove him" at which point defendant slammed Gavender against the wall and held him as he "tried to get away." Justification, under these circumstances was "not a good defense." See, *People v. Gibaldi*, 75 M2d 881.

Defendant asserts that the prosecution witnesses were incredible as a matter of law. The test for such a finding by an Appellate Court is set forth in *People v. Garafolo*, 44 AD2d 86. The rule is that testimony which is impossible of belief because it

is manifestly untrue, physically impossible, contrary to experience, or self-contradictory is to be disregarded as being without evidentiary value. Accord, *People v. Parmiter*, 55 AD2d 938; *People v. Pepitone*, 48 AD2d 135.

If any, it was the testimony of defendant and his witnesses that best fulfilled this test by reason of its uncertainty and contradictions. In particular, it is difficult to believe that Gavender could have suffered all of his facial injuries from a single, allegedly inadvertent, blow to the head.

Nevertheless, defendant received a jury instruction on justification, and had his day in court. Defendant's trial was a fair one *People v. Kingston*, 8 NY2d 384. The issue of witness credibility was for the jury *People v. Lee*, 308 NY 302. The jury has rendered its verdict and that verdict is supported by the evidence *People v. Leonti*, 18 NY2d 384.

This court does not find any error as alleged on appeal, and certainly finds none that would require reversal *People v. Crimmins*, 36 NY2d 230.

In view of the apparent deliberateness of the attack on Gavender, and considering defendant's admitted background of convictions and violations of parole, this court finds that the sentence entered was proper *People v. Hicks*, 48 AD2d 986; *People v. Finke*, 51 AD2d 1089.

The judgment and conviction of defendant as entered in the court below is affirmed in all respects.

Dated: Rochester, New York
July 18, 1978

/s/ DONALD J. MARK
DONALD J. MARK
Monroe County Court Judge

28 U.S.C. 2254(d)

§2254. State custody; remedies in Federal courts

* * * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State Court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual

determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.